



FEDERAL ELECTION COMMISSION  
WASHINGTON, D C 20463

SEP 14 2004

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Dennis Gay

Salt Lake City, UT 84103-2848

RE: MUR 5333

Dear Mr. Gay:

On November 21, 2002, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, the Commission, on June 30, 2004, found that there is reason to believe you violated 2 U.S.C. §§ 441a(a)(1)(A), 441b(a) and 441f, provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

The Commission initially notified you of these actions through your counsel of record, J. Curtis Herge, who has since withdrawn as your counsel in this matter. Accordingly, the Commission is notifying you directly. If you intend to be represented by new counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office,

within 30 days of your receipt of it. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred

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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650. During the period September 10 through October 8, 2004 please contact Cynthia Tompkins, Assistant General Counsel, at the same number.

Sincerely,



Bradley A. Smith  
Chairman

Enclosures  
Factual and Legal Analysis

Designation of Counsel Form

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3  
4 RESPONDENTS: Dennis Gay

MUR 5333

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6  
7 **I. GENERATION OF MATTER**

8 This matter was generated by a complaint filed with the Federal Election Commission by  
9 Scott Clayton. *See* 2 U.S.C. § 437g(a)(1).

10 **II. FACTUAL AND LEGAL ANALYSIS**

11 **A. Complaint and responses and other available information**

12 The complaint alleges that Dennis Gay made excessive contributions to John Swallow for  
13 Congress ("Committee"). The complaint listed Mr. Gay as contributing \$2,000 to the  
14 Committee. The Committee disclosed the receipt from Mr. Gay of \$1,000, which was  
15 designated for the convention, on March 31, 2002, and \$1,000 which was designated for the  
16 general election, on June 28, 2002. As reported on the Committee's disclosure reports, therefore,  
17 these contributions are within the limits of 2 U.S.C. § 441a(a)(1)(A).

18 The available information indicates that the Dennis Gay's contributions were made by  
19 checks drawn on the account of Winterhawk Enterprises ("Winterhawk"). The Winterhawk  
20 checks were attributed to Mr. Gay and several other persons, as set forth in the chart below.  
21 Winterhawk is a limited liability company ("LLC") identified in public records as an active LLC  
22 organized in Utah.<sup>1</sup>

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<sup>1</sup> Winterhawk is listed in public records as Winterhawk Enterprises, LLC.

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Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterhawk Enterprises	3/29/02	\$4,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay
Winterhawk Enterprises	6/21/02	\$5,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay, Haley Gay

1  
2 In the first instance, Winterhawk wrote a \$4,000 check to the Committee dated March 29,  
3 2002. The signature on the check appears to be that of Dennis Gay and the memo line reads  
4 "Dennis, Gina, Bodee, Kim Campaign Donation." The Committee sent a letter to Winterhawk,  
5 dated March 31, 2002, expressing thanks for the contribution and then stating:

6 The strict Federal Election Commission regulations [prohibit] making contributions on  
7 behalf of someone else to federal election campaigns. We must refund this money to you  
8 within thirty (30) days unless you can establish in writing that the contribution came from  
9 personal funds of a corporate drawing account, such as a draw against salary, wages,  
10 dividends, etc. Please confirm that such was indeed the case with this check by signing  
11 below....

12  
13 The letter provides fields for the signature, occupation and employer of each Gay and the date of  
14 their signature. The completed fields contain the signatures of all four individuals dated  
15 April 10, 2002, and identify "Majestic ent,"<sup>2</sup> as the employer of all four individuals.<sup>3</sup>

16 The available information also indicates that Winterhawk wrote a \$5,000 check to the  
17 Committee on June 21, 2002. The signature on the check appears to be that of Dennis Gay and  
18 the memo line reads "Dennis, Gina, Bodee, Kim, Haley Campaign Dona" [sic]. The Committee  
19 sent a copy of an undated letter to Winterhawk regarding the contribution, identical to its  
20 March 31, 2002 letter to Winterhawk. The Committee's undated letter makes no mention of  
21 Haley Gay, the fifth attributed contributor. The completed fields contain the signatures of the

<sup>2</sup> Utah state records indicate three business entities whose names start with "Majestic ent," all of which are expired. Nevada state records list "Majestic Media Holdings, Inc.," with Gina Gay as president and Dennis Gay as secretary and treasurer.

<sup>3</sup> The Committee's disclosure report identified Winterhawk as the employer of all four individuals

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four Gay contributors, with dates ranging from September 20 to September 25, 2002, and identify "Majestic" as the employer of three individuals.<sup>4</sup>

Dennis Gay responded to the complaint, stating a belief that he had "followed the regulations of the FEC" and was allowed to contribute \$1,000 for each of the three elections involving John Swallow.<sup>5</sup> Attached to Mr. Gay's response was a "Receipt Transaction List," apparently from a Committee database, that listed his contributions as \$1,000 for the convention and general elections.

**B. Law on contributions by LLCs, corporations and partnerships**

The Commission's regulations establish two possible treatments for contributions by business entities that are recognized as limited liability companies under the laws of the State in which they are established. 11 C.F.R. § 110.1(g)(1). The treatment depends on how the firm elects to file with the Internal Revenue Service ("IRS"). *Id.* at 110.1(g)(2). If the contribution is from an LLC filing with the IRS as a partnership pursuant to 26 C.F.R. § 301.7701-3, or from one that fails to make an election, it shall be treated as a contribution from a partnership pursuant to 11 C.F.R. § 110.1(e). *Id.* If the contribution is from an LLC electing to file with the IRS as a corporation, the contribution is prohibited. 2 U.S.C. § 441b(a) and 11 C.F.R. § 110.1(g)(3). An LLC that makes a contribution pursuant to this provision shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that it is eligible to make the contribution. 11 C.F.R. § 110.1(g)(5).

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<sup>4</sup> The employer field is blank for the fourth individual, Dennis Gay. The Committee disclosed Winterhawk as the employer of all four individuals.

<sup>5</sup> Dennis Gay's response is undated and was received on December 23, 2002.

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1 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits  
2 corporations from making contributions in connection with any election and prohibits any  
3 candidate or political committee from knowingly accepting or receiving any such contributions.  
4 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any  
5 corporation from consenting to any contribution by the corporation. The Commission has  
6 recognized, however, limited circumstances in which a corporate employee may make a  
7 contribution drawn on a corporate account, specifically, a nonrepayable corporate drawing  
8 account established to permit an employee to draw against her salary, profits or other  
9 compensation. *See Campaign Guide for Congressional Candidates and Committees* (2002),  
10 page 21; *FEC Record*, September 1978, page 1.<sup>6</sup> Contributions may not be made from the  
11 general treasury fund of corporations. *See* 2 U.S.C. § 441b(a); *cf. FEC v. Massachusetts Citizens*  
12 *for Life*, 479 U.S. 238, 241 (1986).

13 A contribution by a partnership shall be attributed to the partnership and to each partner  
14 in one of two ways: 1) in proportion to his or her share of the profits, according to instructions  
15 which shall be provided by the partnership to the political committee or candidate; or 2) by  
16 agreement of the partners, as long as only the profits of the partners to whom the contribution is  
17 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses  
18 increased) in proportion to the contribution attributed to each of them. 11 C.F.R. § 110.1(e). A  
19 contribution by a partnership shall not exceed the Act's limitations on contributions, and no  
20 portion of such contribution may be made from the profits of a corporation that is a partner. *Id.*

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<sup>6</sup> The only place in the Act or the Commission's regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. *See* 11 C.F.R. § 102.6(c)(3). This regulation provides that a contributor may write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor's personal checking account or on a "non-repayable corporate drawing account of the individual contributor." *Id.* *See also* Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983).

**C. Analysis of contributions**

Winterhawk, an LLC, wrote \$9,000 in contribution checks to the Committee.

Winterhawk attributed this amount to Dennis Gay and several other persons. No contributions were attributed to the LLC itself. The threshold question regarding LLC contributions is whether the LLC is to be treated as a corporation or as a partnership, which depends on whether the LLC elected federal income tax treatment as a corporation. *See* 11 C.F.R. § 110.1(g). The available information does not indicate whether Winterhawk elected tax treatment as a corporation.

The Winterhawk checks on their face attribute the contributions among several individuals, but it does not appear that the LLC affirmed to the Committee that it is eligible as an entity to make the contributions in the first place. *See* 11 C.F.R. § 110.1(g)(5). Instead, the Committee's letters in response to the LLC contribution checks invite the attributed individual contributors to categorize the contributions as coming from "personal funds of a corporate drawing account, such as a draw against salary, wages, dividends, etc." Each individual contributor appeared to agree with this categorization by signing in the space provided. While the Commission permits contributions from corporate employees drawn on nonrepayable corporate drawing accounts, *see supra*, the contributions here do not appear to be drawn on such accounts. First, the checks appear to be drawn on the general treasury account of an LLC; no account name is indicated on the checks relating to a possible nonrepayable drawing account. Second, the attributed individual contributors may not even be employees of the LLC. None of the attributed contributors listed Winterhawk as their employer, but the Committee disclosed Winterhawk as the employer of all four individuals.

Thus, if Winterhawk has elected federal income tax treatment as a corporation, its contribution checks may constitute impermissible corporate contributions. Therefore, there is

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1 reason to believe that Dennis Gay, the individual who signed the Winterhawk checks and  
2 appears in public records as both a member and a manager of Winterhawk, violated 2 U.S.C.  
3 § 441b(a) for consenting to corporate contributions.

4 If, in the alternative, Winterhawk is treated as a partnership, its checks to the Committee  
5 constitute contributions from the LLC itself as well as from the “partners” of the LLC. *See*  
6 11 C.F.R. § 110.1(e).<sup>7</sup> Thus, Winterhawk, in writing checks to the Committee in the amounts of  
7 \$4,000 and \$5,000, contributed \$9,000 to the Committee in connection with the convention and  
8 general elections. As for the “partners” of this LLC, public records from Utah identify Dennis  
9 Gay and Gina Gay as members of Winterhawk. By analogy, these members may be the  
10 “partners” to which the LLC contributions may be attributed if the LLC is treated as a  
11 partnership. *See* 11 C.F.R. § 110.1(e) (such attribution shall be in proportion to each partner’s  
12 share of the profits, or, by agreement of the partners, as long as only the profits of the partners to  
13 whom the contribution is attributed are reduced and these partners’ profits are reduced in  
14 proportion to the contribution attributed to each of them). Attributing the LLC contributions  
15 among the members/partners appears to result in excessive contributions on the part of those  
16 individuals. Winterhawk’s \$9,000 in contributions is attributed \$4,500 each to Dennis Gay and  
17 Gina Gay. Thus, there is reason to believe that Dennis Gay violated 2 U.S.C. § 441a(a)(1)(A).

18 Finally, there appear to be contributions made in the name of another whether  
19 Winterhawk was treated as a corporation or as a partnership. The Act prohibits contributions  
20 made in the name of another person and prohibits a person from knowingly permitting her name  
21 to be used to effect such a contribution. *See* 2 U.S.C. § 441f. If Winterhawk was treated as a  
22 corporation, then it made contributions in the names of the various individuals to whom the

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<sup>7</sup> Persons with an ownership interest in an LLC are called “members” rather than “partners.” *See* Utah Revised Limited Liability Company Act, Utah Code Ann § 48-2c-102(14).



- 1 contributions were attributed. If Winterhawk was treated as a partnership, then the attributed
- 2 partners made contributions in the names of the other individuals who are not partners. In
- 3 addition, the various attributed individual contributors may have knowingly permitted their
- 4 names to be used to effect the LLC contributions on their behalf. *See* 2 U.S.C. § 441f.
- 5 Therefore, there is reason to believe that Dennis Gay violated 2 U.S.C. § 441f.

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